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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ROBERT M. DAVIDSON and
VANESSA E. KOMAR,

Petitioners,

v.

JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F. PETRILLO; CHARLES OTT; JOANNE C. WRAY; KENT J. THIRY; JOSEPH C. MELLO; MICHAEL J. MEEHAN; BRUCE R. HEURLIN; ANTHONY P. TARTAGLIA; DVA RENAL HEALTHCARE INC; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS INC; GAMBRO HEALTHCARE INC; DAVITA INC; SEPRACOR INC,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT M. DAVIDSON
VANESSA E. KOMAR
Petitioners Pro Se
P.O. Box 1785
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QUESTIONS PRESENTED

1. Whether the Fifth Circuit Judgment affirming the dismissal of Petitioners' lawsuit for improper venue denied Petitioners' right to Due Process and Equal Protection.

2. Whether the District Court abused its discretion when it denied Petitioners' Motion to Vacate Judgment Under Rule 60(b) and denied Petitioners' Motion to Alter or Amend Judgment Under Rule 59(e).

3. Whether the Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void.

4. Whether the Final Order of District Court dismissing Petitioners' lawsuit for improper venue was an abuse of discretion.

PARTIES BELOW

Petitioners are Robert M. Davidson and Vanessa E. Komar.

Respondents are Jay Grossman, Eudice Grossman, Gayle F. Petrillo, Charles W. Ott, Joanne C. Wray, Kent J. Thiry, Joseph C. Mello, Michael J. Meehan, Bruce R. Heurlin, Anthony P. Tartaglia, DVA Renal Healthcare Inc., Albany Medical College, Vivra Holdings Inc., Gambro Healthcare Inc., Davita Inc., and Sepracor Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	ii
Table of Contents	iii
Table of Appendices	iii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	7
Reasons For Granting The Writ	11
Conclusion	35

TABLE OF APPENDICES

Appendix A – Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit filed March 6, 2008 ..... App. 1

Appendix B – Order of the United States District Court of the Southern District of Texas filed April 22, 2008 ..... App. 3

Appendix C – Order of the United States District Court of the Southern District of Texas filed April 9, 2008 ..... App. 5

TABLE OF CONTENTS – Continued

Page

Appendix D – Order of the United States District Court of the Southern District of Texas filed April 10, 2008 ..... App. 7

Appendix E – Order of the United States Court of Appeals for the Fifth Circuit filed March 26, 2008 ..... App. 11

Appendix F – Order of the United States Court of Appeals for the Fifth Circuit filed March 26, 2008 ..... App. 13

Appendix G – Order of the United States Court of Appeals for the Fifth Circuit filed February 28, 2008 ..... App. 15

Appendix H – Order of the United States District Court for the Southern District of Texas filed February 20, 2008 ..... App. 17

Appendix I – Order of the United States District Court for the Southern District of Texas filed February 6, 2008 ..... App. 18

Appendix J – Letter of November 9, 2007 from the Office of the Clerk Fifth Circuit, United States Court of Appeals ..... App. 20

Appendix K – Order of the United States District Court for the Southern District of Texas filed October 24, 2007 ..... App. 22

Appendix L – Memorandum and Order of the United States District Court for the Southern District of Texas filed August 14, 2007 ... App. 24

TABLE OF CONTENTS – Continued

Page

Appendix M – Final Order of the United States District Court for the Southern District of Texas filed July 5, 2007 ..... App. 29

Appendix N – Memorandum and Order of the United States District Court for the Southern District of Texas filed July 5, 2007 ..... App. 30

Appendix O – Order of the United States District Court for the Southern District of Texas filed May 10, 2007 ..... App. 41

Appendix P – Order of the United States District Court for the Northern District of Texas filed February 2, 2007 ..... App. 43

Appendix Q – Order of Dismissal of the United States District Court for the Northern District of Texas filed January 5, 2007 ..... App. 46

Appendix R – Appellee Sepracor Inc.'s Opposition to Appellants' Second Motion for Declaratory Judgment dated November 20, 2007 ..... App. 48

TABLE OF AUTHORITIES

Page

CASES:

Antonious v. Spalding & Evenflo Companies, 275 F.3d 1066 (Fed. Cir. 2002) 17

Anza v. Ideal Steel Supply Corp., 126 S.Ct. 1991 (2006) 24

Bankers Trust Co. v. Rhoades, 859 F.2d 1096 (1988) 8

Battles v. City of Ft. Myers, 127 F.3d 1298 (11th Cir. 1997) 17

Bernstein v. IDT Corp., 582 F.Supp. 1079 (D. Del. 1984) 25

Courtenay Communications Corp. v. Hall, 334 F.3d 210 (2d Cir. 2003) 14

Fraternal Order of Police Dept. Of Corrections Labor Committee v. Williams, 375 F.3d 1141 (2004) 13

Garcia v. Copenhaver, Bell, and Associates, 104 F.3d 1256 (11th Cir. 1997) 32

Homar v. Gilbert, 89 F.3d 1009, *reversed on the merits*, 117 S.Ct. 1807 (3d Cir. 1996) 11

In re Intermagnetics America, Inc., 926 F.2d 912 (9th Cir. 1991) 35

Justin Love et al. v. National Medical Enterprises et al., 230 F.3d 765 (5th Cir. 2000) 14

Lim Kwock Soon v. Brownell, 369 F.2d 808, noted 1967, 21 Sw.L.J. 339, D.C. Tex. 1966, 253 F.Supp. 963 (5th Cir. 1966) 35

TABLE OF AUTHORITIES – Continued

Page

Mowbray v. Cameron County, Tex., 274 F.3d 269 (5th Cir. 2001) 33

Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182 (2d Cir. 1996) 13

Ojeda-Toro v. Rivera-Mendez, 853 F.2d 25 (1st Cir. 1988) 16

Peacock Records, Inc. v. Checker Records, Inc., 365 F.2d 145, *cert. denied*, 87 S.Ct. 707, 385 U.S. 1003, 17 L.Ed.2d 542 (7th Cir. 1966) 35

Plattner v. Strick Corp., 102 F.R.D. 612 (D.C. Ill. 1984) 35

Stokors S.A. v. Morrison, 147 F.3d 759 (8th Cir. 1998) 29

Templet v. Hydrochem, Inc., 367 F.3d 473 (5th Cir. 2004) 34

Twelve John Does v. District of Columbia, 841 F.2d 1133 (D.C. Cir. 1988) 29

United States of America, ex rel., Robert Davidson, M.D. v. Davita, Inc., Center, et al. (U.S. District Court Southern District of Texas Case 4:07-cv-01530) filed May 4, 2007 ..... 23, 24

CONSTITUTION:

U.S. Const. amend. V 3, 27, 31

U.S. Const. amend. IX 3, 24

U.S. Const. amend XIV 3, 27

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

18 U.S.C. § 201 25
18 U.S.C. § 1512 25
18 U.S.C. § 1513 25
18 U.S.C. § 1951 25
18 U.S.C. § 1952 25
18 U.S.C. § 1962(b) 8
18 U.S.C. § 1964 10
18 U.S.C. § 1965(a) 25
18 U.S.C. § 1965(b) 25
18 U.S.C. § 1965(d) 25
28 U.S.C. § 1391 ..... 32, 34
28 U.S.C. § 1391(b)(2) 32
28 U.S.C. § 1391(b)(3) 32, 34
28 U.S.C. § 2201(a) 28
42 U.S.C. §1983 8
Federal Rule of Appellate Procedure 38 14
Federal Rule of Civil Procedure 9(b) 18
Federal Rule of Civil Procedure 11(b) 17
Federal Rule of Civil Procedure 12(b) 13, 33
Federal Rule of Civil Procedure 56 ..... 11, 13, 32
Federal Rule of Civil Procedure 59(e) 28, 29, 35
Federal Rule of Civil Procedure 60(b) 9, 26, 28, 29, 35

TABLE OF AUTHORITIES – Continued

Page

Arizona Rules of Civil Procedure 5.1 ..... 3, 9, 11, 12, 36

Prescription Drug User Fee Act 5, 6, 11, 36

OTHER AUTHORITIES:

Moore's Federal Practice 33

Moore & Rogers, *Federal Relief from Civil Judgments*, 1946, 55 YALE L.J. 692 n. 266 9

CITATIONS TO OPINIONS AND ORDERS

1. Minute Entry Order of November 24, 2004, in Pima County Superior Court Case C333954, *Grossman v. Davidson*

2. Amended Judgment Nunc Pro Tunc of January 4, 2005, in Pima County Superior Court Case C333954, *Grossman v. Davidson*

3. Judgment of November 26, 2004, Pima County Superior Court Case C333954, *Grossman v. Davidson*

4. Final Order of July 5, 2007 in United States District Court Southern District of Texas

5. Memorandum and Order of July 5, 2007, in United States District Court Southern District of Texas

6. Judgment of March 6, 2008, in United States Court of Appeals Fifth Circuit

7. Memorandum and Order of August 14, 2007, in United States District Court Southern District of Texas

8. Order of September 19, 2008, in United States District Court Southern District of Texas

9. Order of February 28, 2008 in United States Court of Appeals Fifth Circuit

10. Order of April 9, 2008, in United States District Court Southern District of Texas

11. Order of April 22, 2008, in United States District Court Southern District of Texas

12. Order of April 10, 2008, in United States District Court Southern District of Texas

13. Order of March 26, 2008, in United States Court of Appeals Fifth Circuit (Appendix E)

14. Order of March 26, 2008, in United States Court of Appeals Fifth Circuit (Appendix F)

15. Order of November 24, 2003, in United States District Court Arizona District (CV-03-110 TUC FRZ)

16. Order of July 1, 2003, in United States District Court Arizona District (CV-03-110 TUC FRZ)

17. Order of February 2, 2004, in United States District Court Arizona District (CV-03-580 TUC FRZ)

18. Order of Dismissal of January 5, 2007, in United States District Court Northern District of Texas

JURISDICTION

The United States District Court for the Southern District of Texas had subject matter jurisdiction under the Racketeer Influenced and Corrupt Organization Act of 1970 (18 U.S.C. § 1961, *et seq.*) ("RICO"), 28 U.S.C. § 1331, 28 U.S.C. § 1332, 28 U.S.C. § 1367. The opinion and judgment of the Fifth Circuit was rendered on March 6, 2008. Pursuant to Supreme Court Rule 13.1, this petition has been filed within

ninety days of the rendering. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Notifications required by Rule 29.4(b) and (c) have been made.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the due process clause, United States Constitution, Amendment V, is set out below: No person shall . . . be deprived of life, liberty, or property, without due process of law. United States Constitution, Amendment IX provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." United States Constitution, Amendment XIV provides: "No state shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Arizona Rules of Civil Procedure

Rule 5.1 Duties of Counsel

(A) Attorney of Record: Withdrawal and Substitution of Counsel.

(2) Withdrawal and Substitution. Except where provided otherwise in any local rules pertaining to domestic relations cases, no attorney shall be permitted to withdraw, or be substituted, as attorney of record in any pending action except by formal written order of the court, supported by written application

setting forth the reasons therefore together with the name, residence and telephone number of the client, as follows:

(B) Where such application does not bear the written approval of the client, it shall be made by motion and shall be served upon the client and all other parties or their attorneys. The motion shall be accompanied by a certificate of the attorney making the motion that (i) the client has been notified in writing of the status of the case including the dates and times of any court hearings or trial settings, pending compliance with any existing court orders, and the possibility of sanctions, or (ii) the client cannot be located or for whatever other reason cannot be notified of the pendency of the motion and the status of the case.

(C) No attorney shall be permitted to withdraw as attorney of record after an action has been set for trial, (i) unless there shall be endorsed upon the application therefore either the signature of a substituting attorney stating that such attorney is advised of the trial date and will be prepared for trial, or the signature of the client stating that the client is advised of the trial date and has made suitable arrangements to be prepared for trial, or (ii) unless the court is satisfied for good cause shown that the attorney should be permitted to withdraw.

Prescription Drug User Fee Act

21 U.S.C. § 379g

Title 21 – Food and Drugs

Chapter 9 – Federal Food, Drug, and Cosmetic Act

Subchapter VII – General Authority

Part C – Fees

Subpart 2 – fees relating to drugs

Sec. 379g. Definitions

-STATUTE-

For the purposes of this part:

(1) The term "human drug application" means an application for –

(A) approval of a new drug submitted under section 355(b)(1) of this title,

(B) approval of a new drug submitted under section 355(b)(2) of this title after September 30, 1992, which requests approval of –

(i) a molecular entity which is an active ingredient (including any salt or ester of an active ingredient), or

(ii) an indication for a use, that had not been approved under an application submitted under section 355(b) of this title, or

(C) licensure of a biological product under section 262 of title 42.

Such term does not include a supplement to such application,

[*Et seq.*]

21 U.S.C. § 379h

Title 21 – Food and Drugs

Chapter 9 – Federal Food, Drug, and Cosmetic Act

Subchapter VII – General Authority

Part C – Fees

subpart 2 – fees relating to drugs

Sec. 379h. Authority to assess and use drug fees

-STATUTE-

(a) Types of fees

Beginning in fiscal year 2003, the Secretary shall assess and collect fees in accordance with this section as follows:

(1) Human drug application and supplement fee

(A) In general

Each person that submits, on or after September 1, 1992, a human drug application or a supplement shall be subject to a fee as follows:

(i) A fee established under subsection (c)(4) of this section for a human drug application for which clinical data (other than bioavailability or bioequivalence studies) with respect to safety or effectiveness are required for approval.

(ii) A fee established under subsection (c)(4) of this section for a human drug application for which clinical data with respect to safety and efficacy are not required or a

[*Et seq.*]

STATEMENT OF THE CASE

I. Factual summary

Davidsons have stated a non-frivolous claim for relief under the RICO Act, Civil Rights Act of 1871, and Declaratory Judgment Act. The dismissal of this case should be reversed on the merits by this Court. This a case in which questions of subject matter jurisdiction were raised for the first time *after* trial. Davidson did not realize that Meehan's Declaration of Michael J. Meehan (Document 41) was perjured until on or about January 2, 2008. Meehan's perjured affidavit in support of his Motion to Dismiss (Document 41), substantially interfered with Davidsons' ability to fully and fairly try the case. It is clear and well-established law that whenever an officer of the court makes any misrepresentation, whether of commission, or omission, of silence, or of concealment,

that attorney (officer of the court) commits "*fraud upon the court*," and deprives the judge of jurisdiction over the subject matter.

Davidsons have suffered a continuing series of separate injuries. *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (1988). Davidsons' RICO counts demonstrate a pattern of racketeering activity which caused a continuing series of separate injuries. Each turnover order and garnishment proceeding against Davidsons in favor of Jay Grossman and Eudice Grossman in Gregg County, Texas under the Uniform Enforcement of Foreign Judgments Act, represents a separate new injury to Davidsons' business and property. The nexus between the Section 1983 injury, the RICO injury, and the pendant state law injury is found in the Minute Entry Order of November 24, 2004, in the Arizona state action. This Order of the Arizona trial court provides a very direct link[1] between Grossmans' violations of the substantive RICO statute [18 U.S.C. § 1962(b)] alleged in Count One of the Amended Complaint (Document 19), and injury to Davidsons' business and property.

After the U.S. Court of Appeals Judgment of March 6, 2008, Davidsons moved the District Court (Houston) to vacate and set aside the Judgment

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[1] *See also* the Amended Judgment (Nunc Pro Tunc), file-stamped on January 4, 2005, in the Arizona State Action found at pages 34-36 of Document 98. *See* the Judgment of November 26, 2004, in the Arizona State Action.

Under Rule 60(b) (Document 95) and reinstate the lawsuit for jury trial on the merits, as to all parties and all counts. Davidsons also raised the issue of the District Court's subject matter jurisdiction on appeal. The District Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void.

See Document 95 at page 9, ¶ 14, which states,

> "Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense. Moore & Rogers, Federal Relief from Civil Judgments, 1946, 55 YALE L. J. 692 n. 266. There is a powerful distinction between perjury to which an attorney is a party and that with which no attorney is involved. Murray Fogler's knowing, willful participation in Michael J. Meehan's perjured affidavit and Motion to Dismiss (Document 41) is the relevant consideration in Davidsons' seeking relief from judgment or order based upon Fraud on the Court."

Davidsons are not pro se litigants by choice. *See* Count Seven of the Amended Complaint (Document 19). Davidsons are pro se litigants by fiat of the trial court under color of Arizona Rule of Civil Procedure 5.1 ("ARCP 5.1") in the Arizona State Action. ARCP 5.1 is unconstitutional, both on its face, and as applied to the Davidsons. *To date, no federal or state court has ever reached the Constitutionality of ARCP 5.1.*

Davidsons, appearing *of necessity* without the benefit of retained legal counsel, should not be held to an impossible standard. Davidsons should not be expected to know the basis upon which the Fifth Circuit based its judgment, when the judgment was indisputably an *affirmation without opinion* ("AWO"), when even the Honorable District Judge is *admittedly* uncertain as to whether the Fifth Circuit rejected Davidsons' arguments on appeal. The Order (Appendix B) of April 22, 2008, and the Order (Appendix C) of April 9, 2008, are quite remarkable in that even after jurisdiction re-vested (Appendix A) on March 6, 2008, in the District Court, the Court *apparently* persists in the view that this lawsuit was properly dismissed for improper venue on July 5, 2007.

II. Basis for federal jurisdiction

Davidsons' basis for federal jurisdiction and venue is found at ¶s 1 and 2, of pages 1 and 2 of the Amended Complaint (Document 19). Davidsons never *knowingly* waived this statement. The District Court (Houston) had jurisdiction under 18 U.S.C. § 1964(c), 28 U.S.C. § 1331, 28 U.S.C. § 1367, and 28 U.S.C. § 1332. This civil action arises under the laws of the United States.

REASONS FOR GRANTING THE WRIT

Review by this Court is sought pursuant to Supreme Court Rules 10(a) and 10(c). As set out below, the decision of the Fifth Circuit is in conflict with decisions of other circuit courts. As set out below, the decision of the Fifth Circuit *has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the district court, as to call for an exercise of the Court's supervisory power.* As set out below, the decision of the Fifth Circuit *decided an important question of federal law that has not been, but should be, settled by this Court.*

I. A factual amplification

This is an action alleging violations of the Due Process or Equal Protection Clauses of the Fifth and Fourteenth Amendments. Actions of this type cannot be decided on a Rule 56 motion. *Homar v. Gilbert*, 89 F.3d 1009 (3rd Cir. 1996), *reversed on the merits*, 117 S.Ct. 1807. The constitutionality of the Prescription Drug User Fee Act, Arizona Rule of Civil Procedure Rule 5.1, and the declaratory relief sought in Counts Five and Six are material to Davidsons' Article III standing and to Davidsons' assertion of equitable estoppel. This Court is referred to ¶s 89, 90, and 8.78-8.85 of the Amended Complaint (Document 19) under the heading Tolling the Statute of Limitations. *¶89 incorporated by reference ¶s 8.78-8.85. See especially ¶ 90 which states, "Defendants are estopped from*

asserting the statute of limitations as a defense to this Complaint. . . ."

This lawsuit was improperly dismissed on the basis of statute of limitations and res judicata ***without a hearing, without ten-day notice of a hearing, and without an adequately developed record***. The issue of *res judicata* does not appear on the face of the Amended Complaint. The District Judge admitted that she considered evidence extrinsic to the complaint. The merits of Davidsons' Amended Complaint are closely enmeshed with federal and state tolling doctrines (federal equitable estoppel and Texas tolling rules). The Constitutionality of the Prescription Drug User Fee Act is material to Davidsons' Article III standing and to whether Davidsons' have stated a claim for relief under the RICO Act. The Constitutionality of Arizona Rules of Civil Procedure Rule 5.1 is material to Davidsons' Article III standing and to whether Davidsons' have stated a claim for relief under the Civil Rights Act of 1871.

Nowhere in the Final Order of July 5, 2007, did the District Court (Houston) reach the merits of Davidsons' claims. Regardless of how the District Court (Houston) chose to label the dismissal of this lawsuit, the dismissal falls squarely under the heading of an improper jurisdictional dismissal which rested solely upon allegations of *res judicata* and statute of limitations. The dismissal of this lawsuit cannot stand without the allegations of *res judicata* and statute of limitations.

This is a case in which the parties were litigating *numerous* 12(b) motions to dismiss (including 12(b)(6) motions) from *multiple* parties. The District Judge admitted to having considered evidence extrinsic to the complaint. *See* App. 31 where it states, *inter alia*, *"The Court has carefully reviewed the full record in this case. Based on this review and the application of governing legal authorities, the Court grants the Motions to dismiss and* ***dismisses*** *this case for improper venue as to all defendants."*

Davidsons properly raised the issue of procedural impropriety on appeal. By denying Davidsons the greater procedural protections afforded by Rule 56, the District Court (Houston) denied Davidsons their right to Due Process under the Fifth Amendment. Because the Fifth Circuit Judgment was an unpublished nonopinion, ***Davidsons have no way of knowing the basis upon which the Circuit Court affirmed dismissal.*** The District Judge failed to convert the motion to dismiss to a motion for summary judgment. The appellate court should have recharacterized the district court's ruling and reviewed it, as appropriate, pursuant to Rule 56. *Fraternal Order of Police Dept. Of Corrections Labor Committee v. Williams*, 375 F.3d 1141 (2004); *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1187 (2d Cir. 1996). *"[V]igorous enforcement of the conversion requirement helps ensure that courts will refrain from engaging in fact-finding when considering a motion to dismiss, and also that plaintiffs are given a fair chance to contest defendants' evidentiary assertions*

where a court nonetheless does consider evidence extrinsic to the complaint. . . ." *Courtenay Communications Corp. v. Hall*, 334 F.3d 210 (2d Cir. 2003).

Davidsons did not have a fair chance to adequately contest all of defendants' numerous "evidentiary" assertions (much less the perjured assertions) as to venue, *res judicata*, limitations, standing, subject matter jurisdiction, personal jurisdiction, and failure to state a claim, where the District Court considered evidence extrinsic to the Complaint. There was no hearing, no ten-day notice of a hearing, and no opportunity for jurisdictional discovery. *See Justin Love et al v. National Medical Enterprises et al*, 230 F.3d 765 (5th Cir. 2000).

The affidavit and exhibits (circled #1 thru #55) found attached to Document 98 *thoroughly* ***impeach*** the Declaration of Michael J. Meehan (Document 41) and *thoroughly* ***impeach*** certain material jurisdictional assertions found in Grossmans' and Heurlins' motion to dismiss the Amended Complaint (Document 39).

Meehan's Rule 12(b)(2) motion (Document 41) to dismiss the *Complaint* and Grossmans' and Heurlins' motion (Document 39) to dismiss the *Amended Complaint* are also ***impeached*** by the affidavits and exhibits (circled #1 thru #89) submitted to the Fifth Circuit in support of Appellants' Objection to Motion of Grossmans and Heurlin under FRAP 38 ("Appellants' Objection to FRAP 38 Motion") *on or about January 24, 2008.* These exhibits (circled #1 thru

#89) are identical to those which were attached to Document 95 in the District Court (Houston).

Both Meehan's Answer Brief and Grossmans and Heurlin's Answer Brief are ***impeached*** by the affidavits and exhibits (found at circled page #1 thru #89) submitted (as attachments to) in support of Appellants' Objection to FRAP 38 Motion on or about January 24, 2008.

Davidsons did not have access to the disputed information or knowledge of inaccuracies in Meehan's representations, Murray J. Fogler's representations, or Daniel J. Artz's representations, *at the time of the alleged misconduct*. The computer hard drive that Davidson was using in Corpus Christi, Texas from 1999-2000 "*crashed*" several years ago (it may still be recoverable). On or about January 2, 2008, Davidson located scanned documents relating to the Arizona state action in Pima County Superior Court (*Grossman v. Davidson*, Case No. C333954) on a CD that Davidson had "*burned*" to backup the data. On or about January 2, 2008, Davidson also located a box of documents (original legal filings from Pima County Superior Court Case No. C333954) which were obtained from Michael J. Meehan *after multiple requests* on or about January or February of 2002. This box of documents was subsequently moved by Davidson from Tucson, Arizona to Kilgore, Texas, where it remained *in storage* until recently.

Davidsons have made a showing of actual injury and the presence of circumstances beyond the movant's

control that prevented timely action to protect their interests. See Ojeda-Toro v. Rivera-Mendez, 853 F.2d 25 (1st Cir. 1988). *See* the Order (Document 80) filed on September 19, 2007. *See* the affidavit and exhibits submitted in support of Document 83. *See* also the affidavits and exhibits submitted in support of Documents 95 and 98.

The Court is referred to pages 1 and 2 of Davidsons' Reply Brief, which states, *inter alia*,

> Davidsons have *recently* discovered, and *will* provide at trial, a series of fax and mail communications *related to this lawsuit* between Meehan (in Tucson, AZ) and the Davidsons (*in Corpus Christi, TX*) *between October 1999 and May 2000.* These communications include letters on Meehan & Associates letterhead sent by Meehan to the Davidsons in Corpus Christi, Texas dated October 14, 1999, November 30, 1999, December 9, 1999, December 31, 1999, January 4, 2000, January 31, 2000, February 8, 2000, February 29, 2000, March 2, 2000, April 5, 2000, April 7, 2000, and May 3, 2000. ***Meehan perjured himself to the District Court (Houston) to conceal these material jurisdictional facts.*** *See* Meehan's affidavit (filed on May 7, 2007) at CA5 920-923, especially ¶ 6 found at CA5 922, where it states,
>
> ***None of the events related to this matter took place in Texas. I represented Dr. Davidson in Arizona State Court in***

2001-2002. I was permitted to withdraw as Dr. Davidson's counsel by order of an Arizona state court on January 22, 2002. I have had no communications with Dr. Davidson since that time.

FRCP Rule 11(b) provides that persons who sign, file, submit or later advocate documents are certifying to the court that the document or advocacy is based upon the person's best knowledge, information or belief, which is in turn based upon an inquiry that was reasonable in the circumstances of the particular case. An attorney operates under a *"continuous obligation to make inquiries." See Antonious v. Spalding & Evenflo Companies,* 275 F.3d 1066, 1072 (Fed. Cir. 2002). *See Battles v. City of Ft. Myers*, 127 F.3d 1298, 1300 (11th Cir. 1997). Meehan, Heurlin, J. Grossman, E. Grossman, Daniel J. Artz, and Murray J. Fogler, also perjured themselves on Appeal to the U.S. Court of Appeals. *See* Document 95 captioned *"Motion to Vacate Judgment under* FRCP Rule 60(b)."

Meehan represented the Davidsons in Arizona State Court from 1999-2002. Events related to the lawsuit [Civil Action No. 4:07-cv-00471 in the U.S. District Court Southern District of Texas Houston Division] took place in Texas. Davidsons sustained injuries in Texas.

See ¶ 23 of Document 95 which states,

> The Court is referred to the Affidavit and Exhibits attached to this Motion, for competent evidence that Meehan directed multiple

> communications related to this lawsuit to Davidsons in the Southern District of Texas from October 1999 until May 2000. Davidsons' fax number in Corpus Christi, Texas was 361-949-4927 on October 13, 1999. *See* exhibit #1 (the fax cover sheet bearing the letterhead of Meehan & Associates). Area Code 361 is a Corpus Christi, Texas area code. *See* the Declaration of Michael J. Meehan (Document #41) where it states, '***None of the events related to this matter took place in Texas, I represented Dr. Davidson in Arizona State Court in 2001-2002.***' *See* page 11 of Document #41 for the signature of Meehan's retained counsel, Murray Fogler. The Court is again referred to Document #57 for a copy of the retainer agreement between Davidsons and Meehan ***dated October 13, 1999***. Appellants have detailed the alleged fraud *and the alleged fraud on the Court* with the specificity required by FRCP Rule 9(b).

Petitioners incorporate here by reference *in its entirety* the affidavit of Robert M. Davidson, sworn on oath and signed on April 17, 2008, and filed with Document 98 and the exhibits (circled page #1 thru #55), as direct and concise argument amplifying some of the reasons relied on for allowance of the writ under Supreme Court Rule 10. This affidavit states, *inter alia*,

> These Exhibits include true and correct copies of the following: Meehan's Pleadings Index, Volume 1 for the case Robert Michael

> Davidson, et al ads. Jay Grossman, et al (AZ Superior Court – No. 333954, Our File No. 24155-1, for the period July 2, 1999-November 30, 2000. Meehan's Pleadings Index, Volume 2, for the case Robert Michael Davidson, et al ads. Jay Grossman, et al. (AZ Superior Court – No. 333954, Our File No. 240831.70010, for the period December 15, 2000-January 11, 2002. [. . . .] File-stamped court document captioned "Stipulation to Extend time to Answer or otherwise plead and to Vacate Application for Default," ***signed by Michael J. Meehan and Bruce R. Heurlin on October 18, 1999***, and file-stamped by Patricia A. Noland, Clerk Superior Court on October 19, 1999, in Pima County Superior Court Case C333954. File-stamped court document captioned "Answer to First Amended Complaint and Counterclaim," ***signed by Michael J. Meehan on April 28, 2000***, and file-stamped by Patricia A. Noland, Clerk Superior Court on April 28, 2000, in Pima County Superior Court Case C333954. File-stamped court document captioned "Stipulation for Order of Continuance of Trial," ***signed by Michael J. Meehan and Bruce R. Heurlin on November 29, 2000***, and file-stamped by Patricia A. Noland, Clerk Superior Court on November 29, 2000, in Pima County Superior Court Case C333954. [*et seq.*]

Jay Grossman ("Grossman") was an employee of Albany Medical College Allergy Division in the early 90's. Albany Medical College ("AMC") and Anthony P.

Tartaglia ("Tartaglia") are thought to have played a direct role in facilitating the *"relocation"* of Grossman's clinical *"research"* practice from Albany, NY to Tucson, AZ during an ongoing FDA inspection of his federally-regulated conduct. At the time of his relocation, Grossman is known to have been involved in a lawsuit with three physicians. In a sworn affidavit, Richard Ball, M.D., Scott Osur, M.D. and David Shulan, M.D., made accusations of ***violence*** by Grossman and clinical ***research fraud*** by Grossman, in Albany County Case #2960-91. AMC and Tartaglia had actual knowledge, both of the lawsuit and of the allegations of Grossman's research frauds and violence. Grossman subsequently committed serial acts of extortion, retaliation, assault, battery, obstruction of justice upon various members of the clinical research staff (including Davidson) in Tucson, AZ at 698 E. Wetmore Road from on or about September 1, 1998, until on or about May 12, 1999.

Extortion is a crime of violence. Grossman's conduct in both Albany, NY and Tucson, AZ was criminal. Davidson should not have been placed *in harms way* by AMC, Tartaglia, and the coconspirators in this case. AMC and Tartaglia, *and others*, had a duty to report Grossman's misconduct to federal authorities. Instead, AMC, Tartaglia, *and others*, acting by agreement and in concert with Grossman, committed numerous overt acts *and omissions* to conceal *ongoing clinical research frauds* at AMC. AMC, Tartaglia, *and others*, had actual knowledge that Grossman was violent. AMC, Tartaglia, *and*

others, had actual knowledge that Grossman was committing serial clinical research frauds in Albany, NY. Grossman and Thomas B. Edwards, M.D. ("Edwards") are thought to have had contractual relationships with AMC. So too did Timothy G. Wighton (Vivra V.P., Clinical Research) ("Wighton"), and the named defendants to the cause of action presently before this Court, have actual knowledge that Grossman was violent, both in Albany, NY and, subsequently, in Tucson, AZ. The senior management of the "*Vivra*" association-in-fact enterprise (Charles W. Ott, Kent J. Thiry, Joseph C. Mello, and Anthony P. Tartaglia) had actual knowledge that Grossman was violent, both in Albany, NY and, subsequently, in Tucson, AZ. *Wighton is known to have had an affiliation with AMC and Wighton can be placed in Albany, NY (10 Madison Place) at approximately the same time frame that Grossman was in Albany, NY.* William H. Ziering, M.D. (convicted for clinical research fraud) is known to have had a medical license from the state of New York. Joanne C. Wray is known to have been affiliated with Ziering in Fresno, CA. *By information and belief,* Petrillo can be placed in Latham, NY (10 Biscayne Drive) in approximately the same time frame that Wighton and Grossman were in Albany, NY.

Robert M. Davidson ("Davidson") detrimentally relied upon the so-called "ZERO TOLERANCE POLICY" and the policy regarding violence in the workplace found in the Vivra Employee's Handbook. The Court is referred to the transcript from the Dallas

hearing held on January 4, 2007, before Honorable U.S. District Judge Barbara M. G. Lynn in Dallas, Texas in Case 3:06-cv-00920 (1 Hr 30 Mins). A true and correct complete copy of the transcript is found at Document 14-5 filed on 04/06/2007, in Case 4:07-cv-00471. At the Court Reporter's page 18, it states, "*How – which Vivra entity were we primarily injured by, it was – front end it was the fraudulent hiring and retention and lulling inducements that preceded the [state] action. That's where the majority of our injuries took place.*" [THE COURT]: "*Well, you – as I read your complaint, that's all the injury that you claim. Not part. All. You have a significant claim, and I made my preliminary remarks because it's important to me, . . .* "

Assuming *arguendo*, that Davidsons' Amended Complaint in the U.S. District Court Northern District of Texas (Document 57 in Case 3:06-cv-00920), failed to state a RICO claim for *inter alia* fraudulent hiring and retention inducements, an assertion that Davidsons strongly opposed in their Motion to Alter or Amend Judgment under FRCP 59(e) (Document 61 in Case 3:06-cv-00920), Davidsons' Amended Complaint (Document 19) in the U.S. District Court Southern District of Texas (Case 4:07-cv-00471), corrected any alleged pleading deficiencies, added several substantively new Counts (Count Five, Count Six, and Count Seven), and impleaded several additional new Defendants.

Propinquity, "*study buddies*," and the Prescription Drug User Fee Act were essential elements of the enterprise in the case presently before this Court. In

both Albany, NY and Tucson, AZ, propinquity of their clinical research business with their specialty medical practices permitted facile *cross-over* of patients into research studies via fraudulent "*pre-screens*" [pulmonary function tests ("PFTs")]. *See* the Schematic diagram found at pages 8-10 of 11 of Document 16-6 in Case 4:07-cv-00471. *See* ¶s 73-74 at pages 33 and 34 of Document 1 in *closely-related* U.S. District Court Case 4:07-cv-01530, *United States Of America, ex rel., Robert Davidson, M.D. v. Davita, Inc., Center, et al.*(U.S. District Court Southern District of Texas case 4:07-cv-01530) filed May 4, 2007. *See* Appendix H and I. *Bribery* is a predicate act of racketeering under the RICO statute. The User Fees under the PDUFA are bribes. By delaying the publication of the FDA Tucson, AZ EIR of 5/5-6/28/99, the PDUFA II substantially delayed the time at which Davidsons could begin to seek a legal remedy against Defendants. This "*delay*" was intentional and directly targeted at Davidson. ***It was readily foreseeable that this "delay" would result in wasted legal expenses, loss of current employment, loss of prospective legitimate employment opportunities, and damage to Davidsons' reputation.***

Davidsons were deprived of their fundamental right to equality of treatment before the law under the Ninth Amendment of the U.S. Constitution. The "*delay*" and *extraordinary process* faced by Davidson in his interaction with FDA violated Davidson's equal protection rights. Davidsons have alleged interference with a fundamental right by FDA

and Sepracor Inc, motivated by bribery. The FDA treated Davidson differently from other similarly situated clinical research subinvestigators because Davidson exercised his right to equality of treatment before the law by "*blowing the whistle*" on Grossman *for patient safety concerns.* The selective treatment of Davidson by FDA and Sepracor was based on impermissible considerations (bribery of FDA by Sepracor) and to inhibit and punish Davidson's exercise of his Ninth Amendment fundamental right to equality of treatment before the law.

Davidson alleges predicate act injury, substantive RICO injury, enterprise injury, and conspiracy injury to their business and property. Serial, related fraudulent hiring, retention, and lulling inducements, were *directly* targeted at Davidson ***and relied upon by Davidson***. *Anza v. Ideal Steel Supply Corp.*, 126 S.Ct. 1991, 1994 (2006). A number of Davidson's injuries (assault, battery, extortion, retaliation, constitutional violation) *preceded* injury to the United States, making Davidson the directly injured party, *not the United States.* A number of Davidson's injuries (certain predicate act injuries, substantive RICO injuries, enterprise injuries, and conspiracy injuries) occurred *concomitantly* with injury to the United States, *making both Davidson and the United States* directly injured parties. There is no conceptual difficulty with the view that injuries can occur *in parallel*, as well as *in series*. If they occur in parallel, there can be *more than one* directly injured party.

The Affidavit and Exhibits included in the Amended Complaint (Document 19 in Case 4:07-cv-00471) provide competent evidence "*plausibly* suggesting *inter alia* the existence of a conspiracy, enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. This evidence also plausibly suggests violations of 18 U.S.C. § 1952 and 18 U.S.C. § 201 by AMC, Tartaglia, *and others,* in Albany, NY, and provides probable cause to proceed with discovery. This evidence also plausibly suggests that clinical research coordinator, Donald R. Jones, was victim of Grossman's violations of 18 U.S.C. § 1951, § 1512, and § 1513, at AMC, in Albany, NY. *See* Document 19-2 at pages 19, 21, 23, and 24. This misconduct is *virtually identical (similar motive, method, and victim)* to the misconduct by Grossman alleged by Davidson (*and others*) to have occurred in Tucson, AZ.

18 U.S.C. § 1965(a), (b), and (d), and the Fifth Amendment of the U.S. Constitution are the relevant statutes governing the District Court's personal jurisdiction (and venue) over defendants AMC and Tartaglia. There is no impediment to prosecution of a civil RICO action in a court foreign to some defendants if there is a showing that the "*ends of justice*" so require. *See Bernstein v. IDT Corp.*, 582 F.Supp. 1079 (D.Del. 1984). The *ends of justice* do so require in the case presently before this Court.

The Fifth Circuit Order (PER CURIAM) of February 28, 2008 (Appendix G at App.16) states *inter alia*, "IT IS FURTHER ORDERED that the motion of

appellees Jay Grossman, Eudice Grossman, and Bruce Heurlin for sanctions prohibiting the appellants from filing further appeals or civil actions against any of the appellees in this case in any federal court without first providing proof that all of the aforesaid damages and costs awarded by this court under FRAP 38 have been paid in full is GRANTED.

The Order (Appendix G) of February 28, 2008, by the Fifth Circuit Court of Appeals, imposed sanctions against the Davidsons which *effectively* prohibits[2] the appellants [the Davidsons] from timely-appealing within the 30-day statutory time limit from the District Court's Order (Document 96) (Appendix C).

The Order (Appendix G) of February 28, 2008, by the Fifth Circuit Court of Appeals and the Order (Appendix B) of April 22, 2008, by the District Court, have *effectively* impaired Davidsons access to *any* federal court, *except perhaps to this Court*. Davidsons' right to file Motion to Vacate Judgment under Rule 60(b) (Document 95) was statutory and time-limited.

Issue 1: Whether the Fifth Circuit Judgment affirming the dismissal of Petitioners' lawsuit for

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[2] The Grossmans (Jay and Eudice) through their retained legal counsel (Daniel J. Artz) filed a garnishment action in Gregg County, TX Case No. 2005-93-A on or about January 29, 2008, of the operating bank account of Davidsons' medical practice in Longview, TX, which forced Davidson to *immediately* close his Longview, TX medical practice on February 1, 2008, and seek new employment.

improper venue denied Petitioners' right to Due Process and Equal Protection.

The Fifth Circuit U.S. Court of Appeals affirmation without opinion (and granting sanctions) denied Davidsons Due Process *and Equal Protection* (impairing right of access to the courts) rights under the Fifth Amendment of the U.S. Constitution. Davidsons incorporate here by reference ¶s 9-17 of Document 98.

This final judgment deprived both Davidsons and the United States of Constitutional Due Process by impairing their right of access to the courts. This final judgment was so vague as to prevent even the Honorable District Judge from certainty as to whether the Fifth Circuit rejected Davidsons' arguments on appeal. Instead of guidance from the Appellate Court, the District Judge was *apparently* confused by the vagueness of the Appellate ruling.

Wide variations between the U.S. Circuit Courts of Appeal regarding the use of AWO's, and their constitutional significance under Equal Protection, provides a compelling reason for granting review on this writ of certiorari. At least when the Ninth Circuit issued rulings (Ninth Circuit Court of Appeals Case 04-15304 and Case 03-17342) which affirmed the holdings of the District Court (Arizona district), their unpublished opinions provided written opinions supported by cited authorities. *See* Document 83-6 (filed on 10/22/2007) at pages 20-24 of 40.

The Judgment of March 6, 2008, and sanctions by the Fifth Circuit United States Court of Appeals, deprived Davidsons of their right to due process under the U.S. Constitution. The Fifth Circuit U.S. Court of Appeals' Orders (Documents 85, 86, and 87) (Appendix G, F, E) impair Davidsons' time-limited, statutory right to appeal from the District Court's Order (Document 96) (Appendix C) filed on April 9, 2008, and from the District Court's Order (Document 99) (Appendix B) filed on April 22, 2008.

Appellants' First Motion for Declaratory Judgment was *received but not filed* by the Clerk of the Fifth Circuit. Similarly, Appellants' Second Motion for Declaratory Judgment was *received but not filed* by the Clerk of the Fifth Circuit. *See* Appendix J and R. ***Davidsons were denied Due Process under the Fifth Amendment by the selective non-docketing of Appellants' First Motion for Declaratory Judgment and Appellants' Second Motion for Declaratory Judgment. This decision not to file these Motions was based on a faulty interpretation of the federal Declaratory Judgment Act.*** "*Any court of the United States*" may render a declaratory judgment. 28 U.S.C. § 2201(a) (*see* Appendix J and R). The issues underlying the declaratory relief sought in these motions have been *thoroughly* briefed and are ripe for this Court to grant certiorari.

Issue 2: Whether the District Court abused its discretion when it denied Davidsons' Motion to Vacate Judgment Under Rule 60(b) and denied Davidsons' Motion to Alter or Amend Judgment Under Rule 59(e).

Davidsons incorporate here *in its entirety* by reference, Motion to Vacate Judgment Under Rule 60(B) (Document 95). Davidsons incorporate here *in its entirety* by reference, Davidsons' Motion to Alter or Amend Judgment Under Rule 59(e) (Document 98). The District Court's failure to conduct a plenary review of the *new evidence* and *extraordinary circumstances* did not exercise its discretion. *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). " . . . a denial of Rule 60(b) relief should be reversed if it is based on an error of law. This is consistent with the abuse of discretion standard." *Stokors S.A. v. Morrison*, 147 F.3d 759, 761 (8th Cir. 1998). "A district court necessarily abuses its discretion if it bases its decision on *an erroneous view of controlling law*." The District Court based its decision on an erroneous view of controlling law in the Order (Appendix C) of April 9, 2008. *See* App. 5 and App. 6, where it states,

> This case is before the court on Plaintiffs' Motion to Vacate Judgment Under Rule 60(b) ("Motion") [Doc. #95]. FN1 Plaintiffs allege that the Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void. Plaintiffs raised these same allegations before the Fifth Circuit during the appeal. *See*, e.g., Motion, ¶ 17. Finding no merit in Plaintiff's arguments, ***and*** finding that the arguments were presented to and ***apparently*** rejected by the Fifth Circuit, it is

> hereby ORDERED that the Motion to Vacate Judgment [Doc. #95] is DENIED. [boldface, italics, and underline added for emphasis]

The District Judge was *apparently* confused by the vagueness of the Appellate ruling. ***The District Court's rulings (Appendix B and C) were both based on the District Court's incorrect interpretation of the Fifth Circuit's AWO. This is not harmless error. This error greatly prejudiced Davidsons' lawsuit and directly caused actual damages (filing fees and bond for costs on appeal).*** The Fifth Circuit's AWO of March 6, 2008, was more than just an AWO, because it was preceded by three separate orders which granted monetary sanctions and sanctions against filing new lawsuits or appeals *in any federal court until the money judgments have been paid. See* Appendix E, F, and G.

The District Court (Houston) appears to be following the lead of the Fifth Circuit Court of Appeals, by issuing its own "*opinions without reasons.*" *See* Appendix B, C, and D. "*Finding no merit on Plaintiff's arguments*, it is hereby ORDERED . . . ," and "*Finding no merit in Plaintiff's arguments*, and finding that the arguments were presented to and *apparently* rejected by the Fifth Circuit, it is hereby ORDERED. . . ."

The District Judge's use of the conjunctive "*and*," along with use of the word "*apparently*" provides this Court with a very striking example of how the widespread use of unpublished nonopinions by the Fifth

Circuit has amplified the confusion found in an AWO. The uncertainty of "*opinions without reasons*" has propagated from the appellate court to the district court, to the direct detriment of the Davidsons. Davidsons have been deprived of more than just procedural due process by the Fifth Circuit and the District Court. Davidsons have been deprived of property (sanctions, bond for costs on appeal, filing fees) without the due process and equal protection guarantee found in the Fifth Amendment of the U.S. Constitution. With these rulings by the Court of Appeals and the District Court, Davidsons have been *effectively* denied their fundamental right of access to the courts.

Issue 3: Whether the Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void.

Davidsons raised the issue of whether the U.S. District Court (Houston) decision dismissing this case for improper venue was based on fraud or is void, both *during* appeal and *after* appeal. The U.S. District Court erred (Appendix C) in denying Davidsons' Motion to Vacate the Final Order. The U.S. District Court erred (Appendix B) in denying Davidsons' Motion to Alter or Amend Judgment.

Davidsons properly raised the issue of procedural impropriety on appeal in Point of Error One, Four, and Six of Opening Brief. This procedural impropriety deprived the District Judge of subject matter

jurisdiction over this lawsuit. **This is not harmless error. This error greatly prejudiced Davidsons' lawsuit and directly caused actual damages (filing fees and bond for costs on appeal).** The greater procedural protections afforded by Rule 56 appropriately protect plaintiffs who, in truth, are facing challenges to the merits of their complaints. *Garcia v. Copenhaver, Bell, and Associates,* 104 F.3d 1256 (11th Cir. 1997). By denying Davidsons the greater procedural protections afforded by Rule 56 (a hearing and ten-day notice of a hearing), the District Court (Houston) denied Davidsons due process under the Fifth Amendment. ***Judgments entered without affording litigants due process represent a failure of subject matter jurisdiction.***

Issue 4: Whether the Final Order of District Court dismissing Petitioners' lawsuit for improper venue was an abuse of discretion.

Venue for this lawsuit is proper in the Southern District of Texas. This case was improperly dismissed on that basis. The Final Order which dismissed this case for improper venue was procured by fraud or is void. Davidsons' Amended Complaint stated a claim for relief under the RICO act. Venue is proper in the Southern District under 28 U.S.C. § 1391(b)(2), § 1391(b)(3), 18 U.S.C. § 1965, and the Texas Long-Arm statute. The District Court's holdings as to *res judicata* and statute limitations are erroneous for all of the reasons detailed in Issues 1 and 2 of Davidsons' Reply Brief. The statute of limitations is tolled under federal *equitable estoppel*.

This Court is expressly urged to see ¶s 36, 37, 59, and 60 at pages 9, 14, 15 of Plaintiffs' Original Complaint in the U.S. District Court for District of Arizona Case No. 03-cv-580-TUC-FRZ. True and correct copies of pages 9, 14, and 15 of Plaintiffs' Original Complaint are found attached to Document 95 (at circled page numbers 101-104 found at the bottom right hand corner). These exhibits all bear the header from the PACER website for Case 4:07-cv-00471, Document 83-5, filed on 10/22/2007. These exhibits are material to the issue of tolling the statute of limitations (equitable tolling and equitable estoppel) raised on appeal in Point of Error One, Four, and Six of Opening Brief, and in Issue One at pages 1-11 of Reply Brief.

The District Court (Dallas) "*holdings*" with respect to 28 U.S.C. § 1391(b) refer to the Northern District of Texas, *not to the Southern District of Texas*. *Mowbray v. Cameron County, Tex.*, 274 F.3d 269, 281 (5th Cir. 2001). Although judgment merely adjudging remedy to be barred may operate as judgment in bar in forum that rendered it, *it will not have such operative effect in another forum whose remedial law authorizes recovery.* Moore's Federal Practice, supra at ¶ 0.405[1]. The District Court (Houston) "*holdings*" with respect to 28 U.S.C. § 1391(b) *refer to the Southern District of Texas*, not the Northern District of Texas. These "*holdings*" were not necessary to the judgment, once the District Court (Houston) accepted the *res judicata* and statute of limitations allegations in the Defendants' *multiple* Rule 12(b) motions.

Moreover, ***these "holdings" with respect to 28 U.S.C. § 1391(b) are based <u>in part</u> upon the perjury of Meehan with respect to material jurisdictional facts.***

There are no facts in the record of this lawsuit which would suggest that the diverse defendants were all subject to venue in a single state. There is no district in which this action may otherwise be brought. *See* App. 35 of Appendix N, where it states, *"The final section, §1391(b)(3), would permit venue in this district only if there is 'no district in which the action may otherwise be brought.' Because this lawsuit could be brought in Arizona where a substantial part of the events occurred, § 1391(b)(3) does not permit venue in this district. Plaintiffs have not shown that venue in this district is proper under 28 U.S.C. § 1391(b)(3).* ***Here the District Judge has incorrectly applied the governing legal authorities to the facts. This is not harmless error. This error greatly prejudiced Davidsons' lawsuit and <u>directly</u> caused actual damages (filing fees and bond for costs on appeal).*** *See* Appendix D. *See* page 2 of Document 45-2, where it states, *"There shall be no further filings in this Action." Davidsons were absolutely prevented from ever refiling in Arizona.*

Davidsons' Motion (Document 98) *"call[s] into question the correctness of [the] judgment." Templet v. Hydrochem, Inc.*, 367 F.3d 473, 478 (5th Cir. 2004). Venue in this District is proper. ***The case was improperly dismissed on that basis.*** Davidsons

incorporate here by reference the argument and authorities found in Davidsons' Motion to Vacate Judgment under FRCP Rule 60(b) (Document 95). The Court's prior ruling was incorrect, improper, and, as a result, Plaintiffs' Motion to Alter or Amend Judgment under FRCP Rule 59(e) (Document 98) should have been granted.

Relief will lie on a motion from a judgment produced by perjury. *In re Intermagnetics America, Inc.*, 926 F.2d 912 (9th Cir. 1991); *Lim Kwock Soon v. Brownell*, 369 F.2d 808, noted 1967, 21 Sw.L.J. 339. D.C. Tex. 1966, 253 F.Supp. 963 (5th Cir. 1966). Refusal to vacate a judgment by the district court on a motion that asserted that the judgment had been obtained by fraudulent practices by means of which perjured testimony had been procured and that was supported by affidavits and the indication that the witnesses were willing to testify after having been warned of their constitutional rights was not an exercise of sound legal discretion. *Peacock Records, Inc. v. Checker Records, Inc.*, 365 F.2d 145, *cert. denied*, 87 S.Ct. 707, 385 U.S. 1003, 17 L.Ed.2d 542 (7th Cir. 1966); *Plattner v. Strick Corp.*, 102 F.R.D. 612, 614 (D.C. Ill. 1984), citing Wright & Miller.

CONCLUSION

Petitioners pray that this Court issue a Writ of Certiorari, to declare the use of AWO's with sanctions facially unconstitutional, or unconstitutional as

applied to Petitioners; to declare ARCP 5.1 facially unconstitutional, or unconstitutional as applied to Petitioners; to declare the Prescription Drug User Fee Act to be unconstitutional as applied to Petitioners; to reverse the dismissal of this lawsuit on the merits; and to grant Petitioners such other and further relief as it may deem to be just and equitable.

Respectfully submitted,

ROBERT M. DAVIDSON
VANESSA E. KOMAR

Petitioners Pro Se
P.O. Box 1785
Kilgore, TX 75663
903-235-0731

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20650
Summary Calendar

ROBERT M DAVIDSON; VANESSA E KOMAR

Plaintiffs-Appellants

v.

JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F PETRILLO; CHARLES OTT; JOANNE C WRAY; KENT J THIRY; JOSEPH C MELLO; MICHAEL J MEEHAN; BRUCE R HEURLIN; ANTHONY P TARTAGLIA; DVA RENAL HEALTHCARE, INC; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS, INC; GAMBRO HEALTHCARE, INC; DAVITA, INC; SEPRACOR, INC

Defendants-Appellees

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:07-CV-471

(Filed Mar. 6, 2008)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

AFFIRMED; all pending motions or requests by appellants are denied. *See* Fifth Circuit Local Rule 47.6.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO.
v.	§	H-07-0471
	§	
JAY GROSSMAN, *et al.*,	§	
	§	
Defendants.	§	

ORDER

(Filed Apr. 22, 2008)

This case is before the Court on Plaintiffs' Motion to Alter or Amend Judgment Under Rule 59(e) ("Motion") [Doc. # 98]. Plaintiffs allege "manifest error of law, fact, and newly discovered evidence." Finding no merit on Plaintiff's arguments, it is hereby

ORDERED that the Motion [Doc. # 98] is **DENIED**. It is further

ORDERED that Plaintiff may not file any additional motions in this case unless and until they have paid in full the attorneys' fees and costs imposed by the United States Court of Appeals for the Fifth Circuit. *See* Docs. # 85, # 86, and # 87. Any motions filed in violation of this order will be stricken.

SIGNED at Houston, Texas, this **22nd** day of **April, 2008**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiffs,	§	CIVIL ACTION NO. H-07-0471
v.	§	
JAY GROSSMAN, *et al.*, Defendants.	§	

ORDER

(Filed Apr. 9, 2008)

This case is before the court on Plaintiffs' Motion to Vacate Judgment Under Rule 60(b) ("Motion") [Doc. # 95].[1] Plaintiffs allege that the Court's decision dismissing this case for improper venue, a decision that has been affirmed by the United States Court of Appeals for the Fifth Circuit, was based on fraud or is void. Plaintiffs raised these same allegations before the Fifth Circuit during the appeal. *See, e.g.*, Motion,

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[1] The Fifth Circuit ordered Plaintiffs to pay Defendants' attorneys' fees and costs. *See* Docs. # 85, # 86, and # 87. The Fifth Circuit further ordered that Plaintiffs were not to file "further appeals or civil actions" against any of the Defendants in any federal court without first providing proof that Plaintiffs had paid the fees and costs. *See* Doc. # 85. This Court does not express any opinion regarding whether Plaintiffs' filing of the Motion to Vacate is in violation of the Fifth Circuit's orders.

¶ 17. Finding no merit in Plaintiff's arguments, and finding that the arguments were presented to and apparently rejected by the Fifth Circuit, it is hereby

ORDERED that the Motion to Vacate Judgment [Doc, #95] is **DENIED**.

SIGNED at Houston, Texas, this **9th** day of **April, 2008**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON and VANESSA E. KOMAR,	§	
Plaintiffs	§	**CASE NO. H-07-CV-0471**
vs.	§	
JAY GROSSMAN, ET AL,	§	
Defendants.	§	

ORDER ON JOINT MOTION TO DISTRIBUTE BOND FOR COSTS

(Filed Apr. 10, 2008)

CAME ON FOR CONSIDERATION the Joint Motion of Defendants to Distribute Plaintiffs' Bond for Costs, filed herein by Defendants Jay Grossman and Eudice Grossman and Bruce Heurlin (collectively, the "***Grossman Defendants***") and Defendants Gayle F. Petrillo, Charles W. Ott, Kent J. Thiry, Joseph C. Mello, DVA Renal Healthcare, Inc., Vivra Holdings, Inc., Gambro Healthcare, Inc., and Da Vita, Inc. (collectively, the "***Gambro Healthcare Defendants***"), and Defendants Albany Medical College and Anthony Tartaglia (collectively, the "***Albany Medical Defendants***"), and Defendant Sepracor, Inc. ("***Sepracor***"). The Court, having considered the pleadings, finds that the Joint Motion is well founded, and should be granted;

IT IS THEREFORE ORDERED, that the Clerk of the Court is hereby ordered to distribute the Bond For Costs posted herein on October 1, 2007 (Clerk's Receipt No. 4585399) by Plaintiffs Robert M. Davidson and Vanessa E. Komar in the amount of $2,000.00 as follows:

A. To Marcia E. Kurtz, Esq., Bracewell & Giuliani LLP, 711 Louisiana, Suite 2300, Houston, TX 77002, as counsel for the Gambro Healthcare Defendants, the sum of $638.42, being the allowed costs of the Gambro Healthcare Defendants, plus one-third of the balance of the Cost Bond after payment of all allowed costs;

B. To Daniel J. Artz, Esq., Law Office of Daniel J. Artz, 436 East Tripp Road, Sunnyvale, Texas 75182, as counsel for the Grossman Defendants, the sum of $690.17, being the allowed costs of the Grossman Defendants, plus one-third of the balance of the Cost Bond after payment of all allowed costs;

C. To Brian J. Butler, Esq., Bond Schoeneck & King, PLLC, One Lincoln Center, Syracuse, NY 13202, as counsel for the Albany Medical Defendants, the sum of $590.41, being one-third of the balance of the Cost Bond after payment of all allowed costs; and

D. To Sandra F. Palmer, Esq., Sidley Austin LLP, 1501 K Street NW, Washington, D.C. 20005-1401, as counsel for Defendant Sepracor, the sum of $81.00, being the allowed costs of Defendant Sepracor.

In the event that there has been any interest earned on such Bond for Costs, any such interest shall be divided equally and added to the amounts specified in Paragraphs A., B., and C. above.

IT IS FURTHER ORDERED, that Plaintiffs shall remain fully liable to the Gambro Healthcare Defendants, the Albany Medical Defendants, and Defendant Sepractor for the full amount of the attorneys' fees and expenses and double costs awarded to them by the Fifth Circuit Court of Appeals, as follows:

(a) The Gambro Healthcare Defendants, attorneys' fees and expenses in the amount of $35,687.09, plus doubled costs in the amount of $96.00, for a total of $35,783.09;

(b) The Grossman Defendants, attorneys' fees and expenses in the amount of $12,645.39, plus doubled costs in the amount of $199.25, for a total of $12,844.64; and

(c) The Albany Medical Defendants, attorneys' fees and expenses in the amount of $7,852.00; and

(d) Defendant Sepracor, doubled costs in the amount of $162.00,

subject to credit for the sums to be paid out of the Plaintiffs' Bond for Costs. The Plaintiffs' liability for such sums shall constitute a money judgment of this Court, and Clerk of the Court is hereby authorized to issue execution against Plaintiffs pursuant to Federal Rule of Civil Procedure 69 upon the request of any of

the Gambro Healthcare Defendants, the Albany Medical Defendants, and Defendant Sepracor in aid of the collection of such sums.

ENTERED this 9th day of April, 2008.

/s/ Nancy F. Atlas
THE HONORABLE NANCY F. ATLAS,
UNITED STATES DISTRICT JUDGE

(SEAL)

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20650

ROBERT M DAVIDSON; VANESSA E KOMAR

Plaintiffs-Appellants

v.

JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F PETRILLO; CHARLES OTT; JOANNE C WRAY; KENT J THIRY; JOSEPH C MELLO; MICHAEL J MEEHAN; BRUCE R HEURLIN; ANTHONY P TARTAGLIA; DVA RENAL HEALTHCARE, INC; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS, INC; GAMBRO HEALTHCARE, INC; DAVITA, INC; SEPRACOR, INC

Defendants-Appellees

Appeal from the United States
District Court for the
Southern District of Texas, Houston

(Filed Mar. 26, 2008)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of appellees Albany Medical College and Anthony P. Tartaglia for an award of attorney's fees and costs is GRANTED.

IT IS FURTHER ORDERED that attorney's fees of $7,430.00 and costs of $442.00, totaling $7,852.00, be paid forthwith to these appellees, from the Bond for Costs heretofore posted with the district court by appellants if necessary.

IT IS FURTHER ORDERED that attorney's fees of $11,750.00 and costs of $895.39, totaling $12,645.39, be paid forthwith to appellees Jay Grossman, Eudice Grossman, and Bruce Heurlin, also from said Bond for Costs if necessary.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20650

ROBERT M DAVIDSON; VANESSA E KOMAR

Plaintiffs-Appellants

v.

GAYLE F PETRILLO; CHARLES OTT; JOANNE C WRAY; KENT J THIRY; JOSEPH C MELLO; MICHAEL J MEEHAN; DVA RENAL HEALTHCARE INC; VIVRA HOLDINGS INC; GAMBRO HEALTHCARE INC; DAVITA INC; SEPRACOR INC

Defendants-Appellees

Appeal from the United States
District Court for the
Southern District of Texas, Houston

(Filed Mar. 26, 2008)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges..

PER CURIAM:

IT IS ORDERED that the motion of appellees, Gayle F. Petrillo, Charles W. Ott, Kent J. Thiry, Joseph C. Mello, DVA Renal Healthcare, Inc., Vivra Holdings, Inc., Gambro Healthcare, Inc., and DaVita, Inc., for an award of attorney's fees in the sum of $34,894.25 and $792.84 costs, totaling $35,687.09 is GRANTED, same to be paid forthwith from the Bond for Costs heretofore posted with the district court by appellants if appropriate.

IT IS FURTHER ORDERED that the motion of appellees, Gayle F. Petrillo, Charles W. Ott, Kent J. Thiry, Joseph C. Mello, DVA Renal Healthcare, Inc., Vivra Holdings, Inc., Gambro Healthcare, Inc., and DaVita, Inc., for sanctions barring appellants Robert M. Davidson and Vanessa E. Komar from filing suit against the appellees absent proof that all damages awarded by the Court have been paid is GRANTED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-20650

ROBERT M DAVIDSON; VANESSA E KOMAR

Plaintiffs-Appellants

v.

JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F PETRILLO; CHARLES OTT; JOANNE C WRAY; KENT J THIRY; JOSEPH C MELLO; MICHAEL J MEEHAN; BRUCE R HEURLIN; ANTHONY P TARTAGLIA; DVA RENAL HEALTHCARE INC; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS INC; GAMBRO HEALTHCARE INC; DAVITA INC; SEPRACOR INC

Defendants-Appellees

Appeal from the United States
District Court for the
Southern District of Texas, Houston

(Filed Feb. 28, 2008)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges..

PER CURIAM:

IT IS ORDERED that the motion of appellees, Jay Grossman, Eudice Grossman, and Bruce Heurlin for attorneys' fees incurred in connection with this appeal is GRANTED in an amount to be determined following appellees' submission, within 15 days following the filing of this order, of documentation substantiating the proper quantum of such fees to be assessed as damages under FRAP 38.

IT IS FURTHER ORDERED that the motion of appellees, Jay Grossman, Eudice Grossman, and Bruce Heurlin for double costs, which may be recovered under FRAP 38 from the Bond for Costs that the appellants posted with the district court, is GRANTED.

IT IS FURTHER ORDERED that the motion of appellees Jay Grossman, Eudice Grossman, and Bruce Heurlin for sanctions prohibiting the appellants from filing further appeals or civil actions against any of the appellees in this case in any federal court without first providing proof that all of the aforesaid damages and costs awarded by this court under FRAP 38 have been paid in full is GRANTED.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA, ex rel, Robert Davidson, MD, Plaintiffs, v. DAVITA, INC., CENTER, et al., Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-07-1530

ORDER

(Filed Feb. 20, 2008)

In accordance with the Notice of Voluntary Dismissal filed on February 12, 2008 it is hereby ORDERED that this action be dismissed without prejudice, pursuant to Rule 41(a)(1)(A)(i) of the Federal Rules of Civil Procedure.

SIGNED at Houston, Texas, on this 20th day of February, 2008.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA, *ex rel.* Robert Davidson, MD, Plaintiffs, v. Davita, Inc. Center, et al Defendant.	)	No. H-07-CV-1530 **FILED EX PARTE AND UNDER SEAL**

ORDER

(Filed Feb. 6, 2008)

The United States having declined to intervene in this action at this time pursuant to the False Claims Act, 31 U.S.C. § 3730(b)(4)(B), the Court ORDERS THAT:

1. the Complaint be unsealed;

2. all other contents of the Court's file ~~in this action remain under seal and shall not be made public or served upon any party, except for this Order and the Government's Notice of Election to Decline Intervention, which relator shall serve upon the defendants only after service of the complaint;~~ be unsealed

3. the seal be lifted as to all other matters occurring in this action *after* the date of this Order;

4. the parties shall serve copies of all pleadings and motions filed in this action, including supporting memoranda, upon the United States, as provided for in 31 U.S.C. § 3730(c)(3). The United States may order any deposition transcripts and is entitled to intervene in this action, for good cause, at any time;

5. all Orders of this Court shall be sent to the United States, and that;

6. should the relator or defendants propose that this action be dismissed, settled, or otherwise discontinued, the Court will solicit the written consent of the United States before ruling or granting it approval.

Signed: 2/6/08

/s/ Sim Lake
UNITED STATES
DISTRICT JUDGE

APPENDIX J

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

November 9, 2007

Mr. Robert M. Davidson
Ms. Vanessa E. Komar
P.O. Box 1785
Kilgore TX 75663

Re: 07-20650 *Davidson v. Grossman*
USDC No. 4:07-CV-471

Dear Mr. Davidson and Ms. Komar:

The court has received your First Motion for Declaratory Judgment. This court, as a court of appeals, reviews the judgments of district courts. It does not itself issue declaratory judgments; rather, it determines whether a district court acted correctly in granting or denying a declaratory judgment. Thus, if you sought a declaratory judgment in the district court and it was denied, you may argue in this court that the district court erred. However, the court will take no action on your motion.

Sincerely,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ William C. Zapalac
William C. Zapalac
Counsel to the Clerk's Office
(504) 310-7660

c: Mr. Jason Dean Barth
Mr. Dale Bruce Norman
Mr. Daniel James Artz
Ms. Marcia E. Kurtz
Mr. Paul E. Chronis
Mr. Brian J. Bulter [sic]
Ms. Sandra Palmer
Mr. Murray J. Fogler

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiffs,	§	CIVIL ACTION NO. H-07-0471
v.	§	
JAY GROSSMAN, *et al.*, Defendants.	§	

ORDER

(Filed Oct. 24, 2007)

This case, currently on appeal to the United States Court of Appeals for the Fifth Circuit, is before the Court on Plaintiffs' "Motion for Indicative Ruling on Plaintiffs' Motion Under Federal Rule of Civil Procedure 60(b)(4) to Set Aside the Final Order" [Doc. # 83] in which Plaintiffs ask the Court to "indicate that it would be inclined to grant Plaintiffs' Motion . . . under FRCP 60(b)(4) to set aside the Final Order as void." Plaintiffs have not formally filed a Rule 60(b)(4) motion, and it is inappropriate for the Court to render advisory opinions. Plaintiffs' request for relief therefore is without merit. Accordingly, it is hereby

ORDERED that Plaintiffs' "Motion for Indicative Ruling on Plaintiffs' Motion Under Federal Rule

of Civil Procedure 60(b)(4) to Set Aside the Final Order" [Doc. # 83] is **DENIED**.

SIGNED at Houston, Texas, this **23rd** day of **October, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiff,	§	CIVIL ACTION NO. H-07-0471
v.	§	
JAY GROSSMAN, *et al* , Defendants.	§	

MEMORANDUM AND ORDER

(Filed Aug. 14, 2007)

This case is before the Court on Plaintiffs Robert M. Davidson and Vanessa E. Komar's Motion to Alter or Amend Judgment ("Motion") [Doc. # 71]. For the reasons stated herein and in the Court's Memorandum and Order [Doc. # 69] entered July 5, 2007, the Motion is **denied**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert M. Davidson and his wife, Vanessa E. Komar, filed this lawsuit *pro se* against Jay Grossman, Eudice Grossman, Gayle F. Petrillo, Charles W. Ott, Joanne C. Wray, Kent W. Thiry, Joseph C. Mello, Michael J. Meehan, Bruce R. Heurlin, Anthony P. Tartaglia, DVA, AMC, Vivra, Gambro, Davita, and Sepracor. Plaintiffs assert three counts of alleged

RICO[1] violations and a variety of other state and federal claims, all stemming from Davidson's employment at a Vivra research facility in Tucson, Arizona.

The first lawsuit in which Plaintiff(s) asserted these claims against some of these Defendants was filed in the United States District Court for the District of Arizona, and was dismissed in November 2003. The dismissal was affirmed by the United States Court of Appeals for the Ninth Circuit. Plaintiffs' petition for a writ of certiorari to the United States Supreme Court was denied, as was Plaintiffs' petition for rehearing. The second lawsuit involving these same claims and some of the same Defendants was filed in the United States District Court for the Northern District of Texas. There, the Honorable Barbara Lynn, dismissed the lawsuit on January 5, 2007.

On February 2, 2007, Plaintiffs filed the same RICO claims against the current Defendants, some of whom were Defendants in Judge Lynn's case. Plaintiffs assert that venue in the Southern District of Texas is appropriate under either 28 U.S.C. § 1391(b)(2) or the special venue provision for RICO claims, 18 U.S.C. § 1965.

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*

The Court dismissed this third lawsuit for improper venue. Venue was not proper under the general venue statute, 28 U.S.C. § 1391. Plaintiffs were unable to benefit from RICO's special venue provision, 18 U.S.C. § 1965, because Plaintiffs' RICO claims against the Defendants named in the lawsuit in the Northern District of Texas had been dismissed with prejudice and their RICO claims against the Defendants first named in this case were time-barred.

Plaintiffs then filed their Motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. The Motion is now ripe for decision.

II. APPLICABLE LEGAL STANDARD

"A motion to alter or amend judgment must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Ross v. Marshall,* 426 F.3d 745, 763 (5th Cir. 2005) (internal quotations omitted). This type of motion "calls into question the correctness of a judgment." *Templet v. Hydrochem, Inc.,* 367 F.3d 473, 478 (5th Cir.) (quoting *In re TranstexasGas Corp.,* 303 F.3d 571, 581 (5th Cir. 2002)), *cert. denied,* 543 U.S. 976 (2004). Rule 59(e) motions "cannot be used to raise arguments which could, and should, have been made before the judgment issued [and] cannot be used to argue a case under a new legal theory." *Id.* "[A]n unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying

a subsequent motion for reconsideration." *Id.* at 479. Importantly, a "Rule 59(e) motion is not proper to relitigate matters that have been resolved to the movant's dissatisfaction and Plaintiff cannot have a 'second bite at the apple' on the same issues that were previously addressed by the parties and this Court." *Alvarado v. Texas Rangers,* 2005 WL 1420846, *2 (W.D.Tex. June 14, 2005). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet,* 367 F.3d at 479.

III. ANALYSIS

Plaintiffs complain that the Court improperly "converted several motions seeking dismissal for a variety of reasons into essentially an '*omnibus*' motion for summary judgment." *See* Motion, p. 1 (italics in original). Contrary to Plaintiffs' contention, the Court did not convert the motions to dismiss into motions for summary judgment. Instead, the Court ruled on the parties' Motions to Dismiss, in which they asserted improper venue as a basis for dismissal, noting that the RICO claims against certain Defendants were dismissed with prejudice by Judge Lynn and that the RICO claims against the other Defendants were time-barred. For the reasons stated in the Court's prior ruling, venue in this district is improper and the case was correctly dismissed on that basis. As a result, the Motion is denied.

IV. CONCLUSION AND ORDER

Venue is not proper under either the general venue statute, 28 U.S.C. § 1391, or RICO's special venue provision, 18 U.S.C. § 1965. The Court's prior ruling was correct and proper, and, as a result, it is hereby

ORDERED that Plaintiffs' Motion to Alter or Amend Judgment [Doc. # 71] is **DENIED**.

SIGNED at Houston, Texas, this **14th** day of **August, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-07-0471
JAY GROSSMAN, *et al.*, Defendants.	§	

FINAL ORDER

(Filed Jul. 5, 2007)

For the reasons stated in the accompanying Memorandum and Order, it is hereby

ORDERED that Defendants' Motions to Dismiss [Docs. # 9, # 37, # 39, # 41, and # 42] are **GRANTED** and this case is **DISMISSED** for improper venue. This is a final, appealable order.

SIGNED at Houston, Texas, this 5th day of **July, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*,	§	
	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. H-07-0471
	§	
JAY GROSSMAN, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

(Filed Jul. 5, 2007)

This case is before the Court on several motions seeking dismissal for a variety of reasons. *See* Motion to Dismiss by Anthony Tartaglia and Albany Medical College ("AMC") ("AMC Motion") [Doc. # 9]; Motion to Dismiss by Jay Grossman, Eudice Grossman, and Bruce Heurling [sic] ("Grossman Motion") [Doc. # 18]; Motion to Dismiss by Joseph C. Mello, DVA Renal Healthcare, Inc. ("DVA"), Vivra Holdings, Inc. ("Vivra"), Gambro Healthcare, Inc. ("Gambro"), Davita, Inc. ("Davita"), Gayle F. Petrillo, Charles W. Ott, Kent J. Thiry ("Davita Defendants Motion") [Doc. # 42]; Motion to Dismiss by Sepracor, Inc. ("Sepracor") ("Sepracor Motion") [Doc. # 37]; and Motion to Dismiss by Michael J. Meehan ("Meehan Motion") [Doc. # 41]. Plaintiffs filed a Consolidated Response [Doc. # 56] and an Appendix of exhibits [Doc. # 57].

Replies were filed by Meehan [Doc. # 61], Sepracor [Doc. # 62], and AMC [Doc. # 63]. The Court has carefully reviewed the full record in this case. Based on this review and the application of governing legal authorities, the Court grants the Motions to Dismiss and **dismisses** this case for improper venue as to all defendants.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert M. Davidson and his wife, Vanessa E. Komar, are currently residents of Texas. They filed this lawsuit *pro se* against Jay Grossman, Eudice Grossman, Gayle F. Petrillo, Charles W. Ott, Joanne C. Wray, Kent W. Thiry, Joseph C. Mello, Michael J. Meehan, Bruce R. Heurlin, Anthony P. Tartaglia, DVA, AMC, Vivra, Gambro, Davita, and Sepracor. Plaintiffs assert three counts of alleged RICO[1] violations and a variety of other state and federal claims.

Plaintiffs' claims all stem from their employment at a Vivra research facility in Tucson, Arizona. Generally, Plaintiffs allege that Defendants conspired to commit insurance and research fraud, and that they fraudulently induced Plaintiffs to accept employment at the Vivra facility. This is the third lawsuit in which Plaintiffs have asserted these claims against some of these Defendants. The first such lawsuit, filed in the

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[1] Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*

United States District Court for the District of Arizona, was dismissed in November 2003. The dismissal was affirmed by the United States Court of Appeals for the Ninth Circuit, and Plaintiffs' petition for a writ of certiorari to the United States Supreme Court was denied, as was Plaintiffs' petition for rehearing.

Plaintiffs then filed the same RICO claims against some of the same Defendants in the United States District Court for the Northern District of Texas. There, the Honorable Barbara Lynn, dismissed the lawsuit on January 5, 2007.

Plaintiffs then filed the same RICO claims against the current Defendants, some of whom were Defendants in Judge Lynn's case, on February 2, 2007. Plaintiffs assert that venue in the Southern District of Texas is appropriate under either 28 U.S.C. § 1391(b)(2) or the special venue provision for RICO claims, 18 U.S.C. § 1965.

Defendants argue, *inter alia,* that venue here is improper. Once Defendants have raised a proper objection to venue in this judicial district, Plaintiffs bear the burden of proof to establish that the venue they have chose [sic] is proper. *McCaskey v. Continental Airlines, Inc.,* 133 F. Supp. 2d 514, 523 (S.D. Tex. 2001); *Smith v. Fortenberry,* 903 F. Supp. 1018, 1019-20 (E.D. La. 1995); *French Transit, Ltd. v. Modern Coupon Sys., Inc.,* 858 F. Supp. 22, 25 (S.D.N.Y. 1994). The burden is on the plaintiff to institute an action in the proper place, because "[t]o hold otherwise would

circumvent the purpose of the venue statute – it would give plaintiffs an improper incentive to attempt to initiate actions in a forum favorable to them but improper as to venue." *Delta Air Lines, Inc. v. W. Conference of Teamsters Pension Trust Fund,* 722 F. Supp. 725, 727 (N.D. Ga. 1989). Therefore, Plaintiffs bear the burden to establish that the Southern District of Texas is an appropriate venue for this action.

II. VENUE UNDER 28 U.S.C. § 1391

For venue to be proper where jurisdiction is not founded solely on diversity of citizenship, *except as otherwise provided by law,* a civil action may be brought only in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State,
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or
>
> (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b) (emphasis added).

Plaintiffs do not allege that all defendants reside in the same State. Indeed, Plaintiffs allege that

certain Defendants reside in Arizona, others in California, others New York, and still others elsewhere. Because Defendants reside in different states, Plaintiffs cannot establish venue in this district under 28 U.S.C. § 1391(b)(1).

Plaintiffs allege that a substantial part of the events or omissions giving rise to the claim occurred in the Southern District of Texas.[2] Plaintiffs allege that Defendants defrauded Medicare, Medicaid, and other third party insurers in multiple states including Texas; that they defrauded clinical research subjects in multiple states; that they defrauded specialty practice patients in multiple states; that they defrauded clinical research subinvestigators in multiple states including Texas; that they defrauded clinical research coordinators in multiple states, and that they defrauded the United States. Plaintiffs do not, however, identify any specific conduct giving rise to this lawsuit that allegedly took place in Texas. The insurance, research, and employment fraud was allegedly carried out at a research facility run by Vivra in Tucson, Arizona, where Davidson was employed between 1998 and 1999.[3] Plaintiffs' alleged

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[2] In response to Defendants' motions to dismiss, however, Plaintiffs rely solely on the special venue provision for RICO claims. *See* Consolidated Response, at 9.

[3] Amended Complaint, at 28, ¶ 8.103; *id.* at 30, ¶ 14. Davidson mentions a classified ad in the *Tuscon Citizen* on July 15, 1998 that he claims was intended to induce him into employment, and he alleges that he was constructively terminated on May 11, 1999. It is unclear from the Amended Complaint

(Continued on following page)

injuries stem from their employment at Vivra and, therefore, a substantial part of the events or omissions occurred in Arizona, not in the Southern District of Texas. Consequently, venue pursuant to 28 U.S.C. 1391(b)(2) is not proper in this district.

The final section, § 1391(b)(3), would permit venue in this district only if there is "no district in which the action may otherwise be brought." Because this lawsuit could be brought in Arizona where a substantial part of the events occurred, § 1391(b)(3) does not permit venue in this district. Plaintiffs have not shown that venue in this district is proper under 28 U.S.C. § 1391.

III. VENUE UNDER RICO STATUTE

Plaintiffs maintain that they are entitled to venue in this district pursuant to the RICO statute's special venue provision. That section provides for venue:

> (a) . . . against any person . . . in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
>
> (b) . . . in any district court of the United States in which it is shown that the ends of justice require that other parties residing in

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when Vanessa Komar, his wife and a nurse at Vivra, began or ended her employment with Vivra.

> any other district be brought before the court. . . .

18 U.S.C. § 1965.

Plaintiffs allege that DVA, Gambro, and Sepracor reside, are found, have an agent, or transact business in the Southern District of Texas.[4] Assuming, without finding, that the allegations regarding the presence of these three Defendants in this district to be true, venue would be proper as against these Defendants under 18 U.S.C. § 1965(a) only if Plaintiffs properly assert a RICO claim against them.

A. RICO Claims Against Defendants In Northern District Case

Plaintiffs' RICO claims, here and in the Northern District of Texas case, are based on insurance and research fraud and fraudulent hiring and retention inducements. The basic elements of a civil RICO claim are (1) a person who engages in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *Abraham v. Singh,* 480 F.3d 351, 355 (5th Cir. 2007). Moreover, RICO Plaintiffs must be the proper Plaintiffs – "the central question [the Court] must ask is whether the alleged violation led directly to the plaintiff's injuries." *Anza v. Ideal Steel Supply Corp.,* ___ U.S. ___, 126 S. Ct. 1991, 1994 (2006). One is not

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[4] Amended Complaint, at 2, ¶ 2.

a proper RICO plaintiff if the alleged fraud was not directed to that individual. *Id.* at 1997.

Defendants Jay Grossman, Eudice Grossman, Gayle F. Petrillo, Charles W. Ott, AMC, Vivra, Gambro, and Joanne C. Wray were named as Defendants in Plaintiffs' civil RICO case in the Northern District of Texas. In that case, Judge Lynn issued an oral ruling, holding that Plaintiffs did not state a direct injury flowing from the alleged insurance and research fraud and, as a result, Plaintiffs' only RICO injury arose, if at all, from the alleged fraudulent inducement leading to the 1998 hiring of Davidson to work at the Vivra facility. Judge Lynn then held that the allegedly fraudulent hiring was "essentially a single act . . . that does not establish a predicate act under RICO." *See* Transcript of Hearing Before Judge Lynn, Exh. 4 to Doc. # 14, p. 51. Having held that Plaintiffs failed to state a viable RICO claim against the named Defendants, Judge Lynn ruled that venue was not proper in the Northern District of Texas and dismissed the case. Because the venue ruling was based on her holdings regarding the civil RICO claims, Judge Lynn clearly advised Plaintiffs that the dismissal was "with prejudice to refiling based on these allegations." *See id.*, p. 53. Plaintiffs did not file a timely notice of appeal to the Fifth Circuit from Judge Lynn's dismissal with prejudice of their civil RICO claims. Consequently, Judge Lynn's ruling is final and unappealable. As a result, the RICO claims against the Defendants named in the Northern District of Texas case are barred by Judge Lynn's

clear ruling dismissing them with prejudice,[5] and they cannot provide a basis for application of RICO's special venue provision.

B. New Defendants in This Case

All other Defendants have been named for the first time in this lawsuit. Civil RICO claims are governed by a four-year statute of limitations. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987); *Martinez Tapia v. Chase Manhattan Bank,* 149 F.3d 404, 411 (5th Cir. 1998); *Boulmay v. Rampart 920, Inc.,* 124 F. App'x 889, 891 (5th Cir. 2005). The statute begins to run when the plaintiff "knew of [or] should have known of his injury" and not when the plaintiff discovers both a RICO injury and the pattern of racketeering activity. *See Boulmay,* 124 F. App'x at 891 (citing *Rotella v. Wood,* 528 U.S. 549, 553-54 (2000)).

Plaintiffs filed this lawsuit on February 2, 2007. It is clear from Plaintiffs' Amended Complaint and from the full record in this case that the civil RICO

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[5] Many of the Defendants in this case seek sanctions against Plaintiffs, citing Judge Lynn's admonition that Plaintiffs would be in violation of her dismissal order if they "were to essentially reassert what you have asserted here. . . ." *See* Transcript, Exh. 4 to Doc. # 14, p. 54. Because it is Judge Lynn's order that has been violated by Plaintiffs' refiling of their RICO claims against the same entities that were Defendants in her case, the request for sanctions should be presented to Judge Lynn.

claims accrued many years before February 2, 2003, the beginning of the four-year limitations period applicable to the RICO claims. Plaintiffs allege that they suffered injury to their professional reputations through association with Defendants' fraudulent insurance and clinical research practices, and that Davidson would not have accepted and continued his employment with Vivra but for the fraudulent representations made to Davidson. *See* Amended Complaint, ¶ 14. Davidson's employment with Vivra ended in 1999, and Plaintiffs admit that they realized "they had sustained RICO injury ... on or about February 20, 2001, by means of an FOI request." *See* Response [Doc. # 16], pp. 7-8.

Plaintiffs did not, however, assert RICO claims against Defendants Kent Thiry, Joseph Mello, Michael Meehan, Bruce Heurlin, DVA, Davita, Sepracor, or Tartaglia until February 2, 2007, well beyond the four-year statute of limitations. As a result, Plaintiffs' RICO claims against these Defendants are time-barred and cannot support venue under the special RICO venue provision.

IV. CONCLUSION AND ORDER

Venue is not proper under the general venue statute, 28 U.S.C. § 1391. Plaintiffs' RICO claims against the Defendants who were named in the Northern District of Texas case were dismissed with prejudice by Judge Lynn. Her ruling is now final and nonappealable, and Plaintiffs cannot revive the

dismissed claims by filing them here. Plaintiffs' RICO claims against the Defendants who were not named in the Northern District of Texas case are time-barred. As a result, Plaintiffs do not have a civil RICO claim in this case, and they cannot rely on RICO's special venue provision, 18 U.S.C. § 1965. Accordingly it is hereby

ORDERED that Defendants' Motions to Dismiss [Docs. # 9, # 37, # 39, # 41, and # 42] are **GRANTED**. The Court will issue a separate Final Order.

SIGNED at Houston, Texas, this 5th day of **July, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX O

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBERT M. DAVIDSON, *et al.*, Plaintiffs,	§	CIVIL ACTION NO. H-07-0471
v.	§	
JAY GROSSMAN, *et al.*, Defendants.	§	

ORDER

(Filed May 10, 2007)

Several defendants filed motions to dismiss Plaintiffs' original complaint, after which Plaintiffs filed an Amended Complaint [Doc. # 19]. It is hereby

ORDERED that the Motions to Dismiss [Docs. # 18 and # 20] are **DEEMED MOOT**, as the moving Defendants have now filed motions to dismiss the amended complaint. It is further

ORDERED that Defendants Albany Medical College and Anthony P. Tartaglia's Motion to Consider the Motion to Dismiss the Complaint as Addressed to the Amended Complaint [Doc. # 34] is **GRANTED**. It is further

ORDERED that Plaintiffs may not file another amended complaint without leave of court. It is further

ORDERED that Plaintiffs' Motion for Judicial Notice [Doc. # 40] is **GRANTED** only to the extend that the Court can take judicial notice of the ***existence of*** Plaintiffs' Petition for Writ of Mandamus, denied by the United States Supreme Court in November 2006, and **DENIED** in all other respects. It is further

ORDERED that Plaintiffs shall file by May 25, 2007, a consolidated response addressing each issue raised in Defendants' Motions to Dismiss [Docs. # 9, # 37, # 39, # 41, and # 42]. *Plaintiffs are cautioned that failure to respond as ordered by May 25, 2007 may, if appropriate, result in dismissal of this lawsuit.* Defendants may file a reply by June 1, 2007. It is further

ORDERED that by **June 1, 2007**, Plaintiffs shall either present evidence of service on Defendant Joanne Wray or show cause why this case should not be dismissed for lack of service. *Plaintiffs are advised that failure to comply will result in dismissal of this case as to Defendant Wray pursuant to Rule 4(m) of the Federal Rules of Civil Procedure.*

SIGNED at Houston, Texas, this **10th** day of **May, 2007**.

/s/ Nancy F. Atlas
Nancy F. Atlas
United States District Judge

APPENDIX P

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ROBERT M. DAVIDSON (PRO SE) VANESSA E. KOMAR (PRO SE) Plaintiffs,	§	
v.	§	
JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F. PETRILLO; CHARLES W. OTT; JOANNE C. WRAY; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS INC.; GAMBRO HEALTHCARE, INC. Defendants.	§	Civil Action No. 3:06-CV-920-M

ORDER

(Feb. 2, 2007)

Before the Court is Plaintiffs' Motion to Alter or Amend Judgment Under FRCP 59(e). For the reasons set forth below, the Court **DENIES** Plaintiff's Motion.

This Court dismissed Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 12(b)(3), finding that Plaintiffs failed to establish proper venue under either the general venue statute, 28 U.S.C. § 1391(b),

or under the particular venue provision in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1965(a). Within ten days after entry of judgment, Plaintiffs filed their Motion to Alter or Amend Judgment.

A "motion to alter or amend the judgment under Rule 59(e) must clearly establish either a manifest error of law or fact or must present newly discovered evidence and cannot be used to raise arguments which could, and should, have been made before the judgment issued." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003) (quotations omitted).

Plaintiffs fail to assert either of these two reasons as a basis for the Court's granting of their Motion. Though the Plaintiffs attached evidence to their Motion, Plaintiffs made no showing that this evidence was newly discovered or should otherwise be considered after judgment in this case. In order to prevail on a Rule 59(e) motion, the Plaintiffs must show that they were unable to uncover the evidence prior to the Court's judgment. *Miller v. Baker Implement Co.*, 439 F.3d 407, 414 (8th Cir. 2006). Evidence is not "newly discovered" if it was "plainly available or easily discovered" before judgment. *ICEE Distribs., Inc. v. J&J Snack Foods Corp.*, 445 F.3d 841, 848 (5th Cir. 2006). *See also Atl. States Legal Found., Inc. v. Karg Bros., Inc.*, 841 F. Supp. 51, 56 (N.D.N.Y. 1993) ("Newly discovery evidence is that which is truly newly discovered or could not have been found by due diligence.") (internal quotation omitted). Therefore, the Court strikes Plaintiffs' evidence as untimely

filed. *See Templet v. HydroChem Inc.*, 367 F.3d 473, 478 (5th Cir. 2004) (noting the factors for the court to consider include "1) the reasons for the moving party's default; 2) the importance of the omitted evidence to the moving party's case; 3) whether the evidence was available to the non-movant before she responded to the summary judgment motion; and 4) the likelihood that the nonmoving party will suffer unfair prejudice if the case is reopened"). Plaintiffs' Motion is **DENIED.**

SO ORDERED.

DATED: ~~January~~ February 2, 2007.

/s/ Barbara M.G. Lynn
BARBARA M. G. LYNN
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ROBERT M. DAVIDSON (PRO SE) VANESSA E. KOMAR (PRO SE) Plaintiffs,	§	
v.	§	
JAY GROSSMAN; EUDICE GROSSMAN; GAYLE F. PETRILLO; CHARLES W. OTT; JOANNE C. WRAY; ALBANY MEDICAL COLLEGE; VIVRA HOLDINGS INC.; GAMBRO HEALTHCARE, INC. Defendants.	§	Civil Action No. 3:06-CV-920-M

ORDER OF DISMISSAL

(Jan. 5, 2007)

Before the Court are Motions to Dismiss filed by Defendants in this case. Having considered all briefing in this case and after hearing oral argument on the Motions, the Court **GRANTS** the Motions of the Defendants to Dismiss for Improper Venue pursuant to Federal Rule of Civil Procedure 12(b)(3).

The Court finds that the Plaintiffs have failed to establish proper venue under either the general venue state, 28 U.S.C. § 1391(b), or under the particular

venue provision in the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1965(a). The Court finds that the Plaintiffs have failed to establish in their pleadings that a substantial part of the events or omissions giving rise to their claims occurred in this district. The Court finds that the Plaintiffs have failed to show in their pleadings that any of the Defendants reside, are found, have an agent, or transact their affairs in this district, as required to establish venue under the RICO statute. Dismissal of this action is therefore appropriate pursuant to Federal Rule of Civil Procedure 12(b)(3).

It is hereby **ORDERED, ADJUDGED, AND DECREED** that this case is **DISMISSED** in its entirety without prejudice to re-filing in a proper venue. All costs are taxed to the party incurring the same. All findings made by the Court on the record in the hearing held on January 4, 2007, are incorporated by reference.

SO ORDERED.

DATED: January 5, 2007.

/s/ Barbara M.G. Lynn
BARBARA M. G. LYNN
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF TEXAS

APPENDIX R

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT M. DAVIDSON, ET AL., Appellants, v. JAY GROSSMAN, ET AL., Appellees.	No. 07-20650

APPELLEE SEPRACOR INC.'S OPPOSITION TO APPELLANTS' SECOND MOTION FOR DECLARATORY JUDGMENT

Appellee Sepracor Inc. ("Sepracor"), by and through its undersigned counsel, opposes Appellants' Second Motion for Declaratory Judgment ("Motion") pursuant to 28. U.S.C. § 2201(a) for a declaration that the Prescription Drug User Fee Act ("PDUFA") is unconstitutional.

Sepracor submits that the Motion is not properly before the Court and is wholly without merit. Neither Sepracor nor any of the other Appellees is responsible for administering or enforcing the PDUFA, which is solely enforced by the Food and Drug Administration. Nor have Plaintiffs presented any allegations which could reasonably be construed to establish a cognizable injury sufficient to provide Article III standing. In light of the procedural irregularities of Appellant's Motion, Sepracor will not at this time prepare and file

further briefing in response to the Motion. However, should the Court believe a further response would be helpful, Sepracor respectfully requests that the Court enter an order calling for a response and setting a briefing scheduling. Sepracor promptly will file a brief in opposition in accordance with the Court's order.

Dated: November 20, 2007

Respectfully submitted,

/s/ Sandra F. Palmer
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